IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 17TH DECEMBER 2007 / 26TH AGRAHAYANA 1929

WP(C).No. 15516 of 2007(V)

IOP.10/2005 of PRINCIPAL SUB COURT,ERNAKULAM
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PETITIONERS:
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1. **NADEERA SULAIMAN,**
   W/O.LATE M.E.SULAIMAN, CHELLIPADATH HOUSE,
   VADAVUKODE, PUTHENCRUZ, BRAHMAPURAM,
   ERNAKULAM DIST.

2. **NAJEENA SHEREEF,**
   D/O.LATE M.E.SULAIMAN, & W/O.SHEREEF,
   EDAVANAKAD HOUSE, KARA DESOM, KODUNGALLOOR
   TALUK, THRISSUR DIST.

3. **RAHEENA SULAIMAN,**
   D/O.LATE M.E.SULAIMAN,
   CHELLIPADATH HOUSE, VADAVUKODE,
   PUTHENCRUZ, BRAHMAPURAM, ERNAKULAM DIST.

4. **MAHIN ABUBACKER,**
   S/O.LATE SULAIMAN, CHELLIPADATH HOUSE,
   VADAVUKODE, BRAHMPURAM, ERNAKULAM DIST.

BY ADV. SRI.N.P.SAMUEL

RESPONDENT:

M/S.ASIAN TECHS LIMITED,
ENGINEERS, CONTRACTORS & CONSULTANTS,
438/4, 6TH FLOOR, PENA TOWER, KALOOR,
KOCHI - 17, REPRESENTED BY ITS CHAIRMAN AND
DIRECTOR.

BY ADV. SRI.K.L.VARGHESE
SMT.SANTHA VARGHESE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:	**COPY OF REPLY NOTICE SENT BY RESPONDENT COMPANY ON 8/04/2005.**
EXT.P2:	**COPY OF PETITION I.E. I.A.3527/05 IN I.O.P.NO.10/2005 FILED BY RESPONDENT BEFORE THE SUB COURT, ERNAKULAM ON 14/07/2005.**
EXT.P3:	**COPY OF OBJECTION FILED BY PETITIONERS TO I.A.3527/05 IN O.P.10/05 OF THE SUB COURT, ERNAKULAM DTD. 24/09/2005.**
EXT.P3(A):	**COPY OF PETITION FILED BY PETITIONERS AS I.A.NO.5746/05 IN I.A.3527/05 IN O.P.10/05 BEFORE THE SUB COURT, ERNAKULAM DTD. 31/10/05.**
EXT.P4:	**COPY OF ORDER IN I.A.3527/05 IN I.O.P.NO.10/05 OF THE SUB COURT, ERNAKULAM DTD. 23/08/06.**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.N.KRISHNAN, J

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W.P.(C) No.15516 OF 2007

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Dated this the 17th day of December 2007

JUDGMENT

This writ petition is filed against the order of the Prl.Sub Judge, Ernakulam in I.A.No.3527 of 2005 in I.O.P.No.10 of 2005. The said application is filed by the respondent in the I.O.P. contending that there is an arbitration clause and therefore the subject matter of the dispute is arbitrable and therefore a suit will not lie. The learned Sub Judge found in favour of the respondent in the I.O.P. and it is against that decision the present writ petition is filed.

2. Heard the learned counsel on both sides. Learned counsel for the petitioners would submit before me that it is not appropriate to consider the question of arbitrability of the agreement at a stage where the court is only concerned with the indigency of the person who has moved the indigent O.P. I find considerable force in the said contention. What is to be enquired into under Order 33 is regarding the sufficiency of the means of the alleged indigent person to pay court fee or not. If the court finds that he is having sufficient means then the court will direct him to make the payment and if

otherwise the court will permit him to sue as an indigent person, direct the office or Registry concerned to convert the I.O.P. as a suit and then call for the written statement of the defendant or in other words an answer to the plaint can be given by the defendant only when really the I.O.P. is converted as an original suit. This matter has come up for consideration before this Court in the decision reported in NIIT Ltd. v. Manoharan (2005 (3) KLT 1025).

> "Under the 1940 Act, an application for reference was required to be filed "at any time before filing a written statement or taking any other steps in the proceedings". Under S.8 of the present Act, the expression used is "not later than when submitting his first statement on the substance of the dispute". The expression " substance of the dispute" could have reference only to the merits of the case. It cannot be said that any proceeding like an application under Order XXXIIIR. 1 and the proceedings therein, preceding the commencement of the suit, would come within the expression 'dispute' under S.8(1) of the Act. A 'dispute' could only be the dispute between the parties which is sought to be resolved in the suit and matters connected therewith and not a dispute as to whether the plaintiff should be allowed to file the suit as an indigent person. Such questions have no relevance to the question to be tried and decided in the suit and, therefore, those matters cannot be termed as disputes coming within the purview of S.8(1) of the Act. The purpose of the expression "not later than when submitting his first statement on the substance of the dispute" occurring in S.8(1) is that a party requesting for reference to arbitration must make use of the first opportunity to have the reference and he

> cannot be permitted to protract the proceedings and take such a contention at a belated stage after taking his defence in the suit.

Learned counsel for the respondent herein strongly contends before me that Section 8 will come into play the moment a proceeding is initiated and therefore it was an imperative duty on their part to raise the objection regarding the maintainability of the suit and about the arbitrability of the dispute. I feel that it can be done only in the next stage for the reason that the scope of enquiry contemplated in the I.O.P. is limited to the means and it does not touch the subject matter for which the petition is filed and such a question arises only after indigent petition is converted as a suit. Therefore, I accept the contentions of the petitioners and set aside the order in the I.A. and direct the court below to consider the question of indigency of the petitioner therein, pass appropriate orders and the moment the petition is converted as a suit then revive this petition and hear the parties and dispose of the matter in accordance with law. Since the application has already been filed here, I find it not necessary for the respondent herein to file a fresh application for deciding the question whether the matter has to be referred to

the arbitrator or not.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-